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Ding Laeng v KTS Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(IM)-99–01 OF 2016 AND Q-02(IM)-100–01 OF 2016
TENGKU MAIMUN, BADARIAH SAHAMID AND KAMARDIN HASHIM JJCA
1 NOVEMBER 2016

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Civil Procedure — Setting aside — Judgment in default — Respondents obtained judgment in default for injunction against appellant — Appellant applied to set aside judgment in default — Whether there was delay in filing application to set aside judgment — Whether judgment regular or irregular — Rules of Court 2012 O 13 r 6 & O 29

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The respondents had initially obtained judgment in default of appearance for injunction against the appellant in a suit for defamation. The appellant then filed a notice of application to set aside the judgment in default ('encl 66'), and contended that he had never received any court documents from one Mugang Ngang who allegedly had personally served the writ and statement of claim to the appellant. However, encl 66 was dismissed by the trial judge, hence the present appeal. The respondents relied on the case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112 ('Yap Ke Huat') and submitted that the judgment in default was a regular judgment despite there being no application for leave. The respondents further submitted that there was delay in filing of encl 66 by the appellant. The issue for court's decision was whether the judgment was a regular or irregular judgment.

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Held, allowing the appellant's appeal with costs and setting aside the High Court's order:

(1) Based on the record of appeal, there was no application filed by the respondents for leave to enter judgment against the appellant as required under O 13 r 6(1) of the Rules of Court 2012 ('the ROC') (see para 23).

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(2) Reliance on *Yak Ke Huat*'s case by the respondents was misplaced because in entering the judgment in default, the plaintiffs in the said case had abandoned their claim for account and declaration and had confined themselves for the claim for unliquidated damages. However, the respondents in the present case did not make any election but pursued their claim for injunction and in fact obtained the judgment in default for injunction. In addition, in obtaining the injunction order, the respondents had circumvented O 29 of the ROC (see paras 25–26).

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(3) There was no delay in the filing of encl 66 by the appellant. On the facts, the appellant did challenge the personal service purportedly effected on him by Mugong Ngang, nevertheless, there was no affidavit filed by Mugong Ngang to rebut the appellant's averment. Even if there was any delay, it was not fatal to the application. In totality, the judgment in default entered against the appellant was in contravention of O 13 r 6 of the ROC and was therefore bad in law and ought to be set aside *ex debito justitiae* (see paras 27–28).

[Bahasa Malaysia summary

Responden-responden telah pada mulanya memperolehi penghakiman ingkar kehadiran bagi injunksi terhadap perayu dalam tindakan untuk fitnah. Perayu kemudiannya memfailkan notis permohonan untuk mengetepikan penghakiman ingkar ('lampiran 66'), dan berhujah bahawa dia tidak pernah menerima apa-apa dokumen mahkamah daripada seorang bernama Mugang Ngang yang mendakwa telah secara peribadi menyerahkan writ dan pernyataan tuntutan tersebut kepada perayu. Walau bagaimanapun, lampiran 66 ditolak oleh hakim perbicaraan, maka rayuan ini. Responden-responden bergantung ke atas kes *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112 ('Yap Ke Huat') dan berhujah bahawa penghakiman ingkar tersebut adalah penghakiman tetap meskipun tidak terdapat permohonan untuk izin. Responden-responden selanjutnya berhujah bahawa terdapat kelewatan dalam memfailkan lampiran 66 oleh perayu. Isu untuk keputusan mahkamah adalah sama ada penghakiman adalah penghakiman tetap atau tidak tetap.

Diputuskan, membenarkan rayuan perayu dengan kos dan mengetepikan perintah Mahkamah Tinggi:

(1) Berdasarkan rekod rayuan, tidak terdapat permohonan yang difailkan oleh responden-responden untuk izin memasukkan penghakiman terhadap perayu seperti yang dikehendaki di bawah A 13 k 6(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') (lihat perenggan 23).

(2) Penggunaan kes *Yak Ke Huat* adalah disalahletakkan oleh responden kerana dalam memasukkan penghakiman ingkar, plaintif-plaintif dalam kes tersebut telah meninggalkan tuntutan mereka bagi akaun dan perisytiharan dan membatasi diri mereka bagi tuntutan untuk ganti rugi jumlah tidak tertentu. Walau bagaimanapun, responden-responden dalam kes ini tidak membuat apa-apa pilihan tetapi meneruskan tuntutan mereka untuk injunksi dan sebenarnya memperolehi penghakiman ingkar bagi injunksi. Selanjutnya dalam memperolehi perintah injunksi, responden-responden telah memintasi A 29 KKM (lihat perenggan 25–26).

(3) Tidak terdapat kelewatan dalam pemfailan lampiran 66 oleh perayu. Atas

fakta, perayu tidak mencabar penyerahan peribadi yang didakwa dikuatkuasakan ke atasnya oleh Mugong Ngang, walau bagaimanapun, tidak terdapat afidavit yang difailkan oleh Mugong Ngang untuk mematahkan hujahan perayu. Walaupun jika terdapat apa-apa kelewatan, ia bukan serius kepada permohonan. Secara keseluruhannya penghakiman ingkar yang dimasukkan terhadap perayu adalah bertentangan A 13 k 6 KKM dan oleh itu salah dari segi undang-undang dan patut diketepikan *ex debito justitiae* (lihat perenggan 27–28).]

Notes

For cases on judgment in default, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8312–8317.

Cases referred to

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (refd)
Lam Kong Co Ltd v Thong Guan & Co (Pte) Ltd [1985] 2 MLJ 429, SC (refd)
Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129, SC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 4 CLJ 175, CA (distd)

Legislation referred to

Rules of the Court 2012 O 13 rr 1, 2, 3, 4, 6, 6(1), 8, 29
Rules of the High Court 1980 O 13 r 6(1), O 19 r 9
Rules of the Supreme Court 1957 O 13 r 12

Appeal from: Civil Suit Nos MYY-22–37/10 of 2012 and MYY-22–38/10 of 2012 (High Court, Miri)

Sam Laya (Sam & Co) for the appellant.
Henry Ling (Ling & Wong) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] These were Ding Laeng's ('the defendant') appeals against the order of the High Court in dismissing his applications to set aside the judgment in default dated 20 February 2013.

A THE BACKGROUND FACTS

[2] The respondent in Appeal No Q-02(IM)-99–01 of 2016 (KTS Sdn Bhd) and the respondent in Appeal No Q-02(IM)-100–01 of 2016 (Pusaka KTS Forests Plantation Sdn Bhd) were and are at all material times in the same group of companies.

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[3] Vide Suit No MR-21–11 of 2011 ('Suit No 21'), the defendant with six others, on behalf of themselves and on behalf of all the residents of the longhouse known as Kampong Long Panai at Sg Tutoh, Baram, Miri Division, Sarawak, sued Pusaka KTS Forests Plantation Sdn Bhd and three others.

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[4] On or about 27 October 2011, the defendant acting for himself and for the other plaintiffs in Suit No 21, wrote to the Chief Judge of Sabah and Sarawak ('CJSS') ('the letter'). The letter reads:

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> Kami ingin memohon untuk kes kami seperti tersebut diatas didengar oleh seorang Hakim yang bukan berasal dari Sarawak, khususnya dari Bandar Sibu, Sarawak atas sebab-sebab seperti berikut:
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> E
> (i) YA Tuan Stephen Chung pernah jadi rakan kongsi, Tetuan Stephen Robert & Partners Advocates, Sibu. Antara rakan kongsinya iaitu seorang peguam bernama Robert Lau. Bapa Robert Lau adalah Chairman KTS Sdn Bhd. *KTS Sdn Bhd dan/atau pengarahnya adalah pemegang syer Defendant Keempat iaitu satu pihak yang terlibat dalam kes ini.*
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> (ii) *KTS Sdn Bhd dan pemegang syer dan/atau ahli lembaga pengarahnya dan/atau anak syarikatnya bertapak di Sibu dan di Kuching. Oleh itu, pengaruh mereka meluas di negeri Sarawak.*

[5] The letter was sent to CJSS by fax and by hand, delivered to the senior assistant registrar at the Kompleks Mahkamah Miri. Acting on the said letter, CJSS assigned Ravinthran N Paramaguru J who was then the judge at High Court Kuching, to preside in Suit No 21. The suit was eventually dismissed by Ravinthran J.

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H **[6]** Arising from the letter, KTS Sdn Bhd and Pusaka KTS Forests Plantation Sdn Bhd ('the plaintiffs') filed separate suits against the defendant in the High Court at Miri, which were registered as Suit No MYY-22–37/10 of 2012 and MYY-22–38/10 of 2012 respectively ('the defamation suits').

I **[7]** The plaintiffs pleaded that the underlined words in the letter ('the impugned words') referred to and was understood to refer to them and that the same were defamatory of them. The plaintiffs pleaded that the impugned words, in their natural and ordinary meaning meant and were understood to mean, among others, that:

(a) their shareholders and directors were in a position to influence the courts or judges in Sarawak on their impartial judicial decision making and discretion;

(b) their shareholders and directors had manipulated or influenced the courts or judges in Sarawak to take side in which the plaintiffs or any company in KTS Group of companies or subsidiaries were party or parties to legal proceedings;

(c) their shareholders and directors had conducted themselves in such a manner repugnant to the constitutional duties of the courts or judges;

(d) their shareholders and directors had conducted themselves in such manner dishonestly or brought the impartiality of judges into judicial disrepute;

(e) their shareholders and directors had undermined the judges' independence and the integrity of the justice system in Sarawak; and

(f) their shareholders and directors did not have any reputation for honesty and integrity and to respect a rule of law and impartial justice system.

[8] The writ and the statement of claim for the defamation suits were purportedly served personally on the defendant. The affidavit of service affirmed by one Mugang Ngang states:

> 2. That under the direction of Mr Henry Ling Kuong Meng of counsel for the abovenamed Plaintiff, I did on *Saturday 3rd November 2012*, at *7.45pm* ... serve on Ding Laeng by way of personal service at Lutong Cafe (Table 6), Lot 93, Lutong Bazaar, Lutong with a service copy of the Writ dated *25th October 2015* together with the Statement of Claim in this action which appeared to me to have been regularly issued out of the Registry of High Court at Miri.
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> 3. I know the said Ding Laeng personally since secondary school days. I recognize him personally of which I had invited him to a dinner at Lutong Cafe on 3rd November 2012 for a dinner and for the purpose of serving him the Writ and Statement of Claim in this action. The said Ding Laeng admitted to me that he was Ding Laeng and he accepted service thereof but refused to acknowledge receipt of the said Writ dated 25th October 2012 and Statement of Claim by signing on the proof copy of the Writ.

[9] On 20 February 2013, the plaintiff obtained a judgment in default against the defendant in the defamation suits. The judgment reads:

> This action having this day been called on for hearing before YANG ARIF TUAN STEPHEN CHUNG HIAN GUAN in the presence of MR HENRY LING KUONG MENG of counsel for the Plaintiff and the Defendant not appearing and no appearance having been entered by the Defendant in this action though duly served with the Writ and Statement of Claim.

IT IS THIS DAY ADJUDGED that an injunction to restrain the Defendant, his servants or agents or otherwise from speaking and further publishing, or causing or permitting to be published the said or similar words as pleaded in the Statement of Claim or any other words to the same or any similar effect in any manner whatsoever in the future;

AND IT IS ADJUDGED that an interlocutory judgment be and is hereby entered against the Defendant and the Defendant do pay the Plaintiff damages to be assessed by the Registrar with costs to be taxed;

AND IT IS LASTLY ADJUDGED that interest at 5% per annum on such damages or judgment debts current at the date of the said publication till date of full payment.

[10] Pursuant to the judgment in default, the plaintiffs took out execution proceedings where a writ of possession and a prohibitory order were entered on the defendant's immoveable properties known as Lot 8131 Block 5 and Lot 938 Block 10, Kuala Baram Land District, respectively.

[11] On 8 July 2015, the defendant filed a notice of application (encl 66 in both the defamation suits), seeking for the following orders:

(a) that leave be granted to extend and/or abridge the period of time to file and serve the notice of application to set aside the judgment in default of appearance;

(b) that the judgment in default of appearance be set aside on such terms as the court thinks fit;

(c) that leave be granted to file and serve defence on the plaintiff within 14 days from the date of the order; and

(d) that all execution proceedings including the public tender of his immoveable properties be stayed.

[12] In his affidavit in support, the defendant averred, inter alia, that:

3. Sometime in the evening of 26.5.2015 upon my arrival in Miri after coming down from my farmhouse in my village in Kampong Long Panai, Sg. Tutoh, Baram, I was informed by a relative that he has come across an advertisement on a Notice of Sale in Utusan Borneo stating that I am subjected to two (2) execution proceedings in the Miri High Court in which my two (2) pieces of landed properties in Miri are being put up for public tender which will be held on 9.7.2012. ...

4. Since I stay at my farm in Kampong Long Panai, Sg. Tutoh, Baram, Sarawak most of the time and seldom come to Miri town I did not know of any suit including any subsequent execution proceedings filed by the Plaintiff/Judgment Creditor herein against me until I was informed of the matters stated in paragraph 3 above.

5. On the morning of the following week Monday 29.6.2015 I also had checked with Mr. Harrison Ngau, a lawyer who had acted for me and 6 other claimants (as

Plaintiffs) against the Plaintiff (as Defendant) and 3 others in the Miri High Court in Suit No. MR-21-11-2011 as to whether the former had come been served (sic) with any documents in relation to any suit and/or execution proceedings against me herein. However, I was told by lawyer Mr. Harrison Ngau that he has not come across any court document in relation to such suit and/or execution proceedings herein.

[13] More pertinent was para 12 wherein the defendant averred as follows:

12. I crave leave to refer to the Affidavit of Service by Mugang Ngang (WNKP. 540607-13-6017) affirmed on 19.11.2012 (Enclosure 2) produced in paragraph 11(ii) above, I state that I do know the said person by the name of Mugang Ngang and that on his invitation we together had dinner at Lutong Cafe sometime on the evening of the 3.11.2012; that in the course of our conversation I was informed by the said Mugang Ngang that I am in the process of being sued by the Plaintiff but I was never being shown of any Court document by the said Mugang Ngang until I had finished dinner with him and went back home. I therefore strongly deny that I have been personally served with a service copy of the said Writ and Statement of Claim dated 25.10.2012 (Enclosure 1) as claimed herein.

[14] In the High Court, the application in encl 66 was opposed by the plaintiffs on two grounds: firstly that there was a delay on the part of the defendant in filing the application and secondly that the plaintiffs had proceeded with the execution proceedings where they had successfully sold the defendant's land Lot 8131 Block 5, Kuala Baram on 9 July 2015. The plaintiffs contended that the application, if allowed would cause grave injustice to the plaintiff and the successful purchaser.

[15] Enclosure 66 was dismissed by the learned judicial commissioner, hence the appeal before us.

THE APPEAL

[16] It is trite that in considering the application to set aside a judgment in default, the starting point was to ascertain whether the judgment was a regular or irregular judgment. If it was an irregular judgment, the default judgment ought to be set aside *ex debito justitiae*. If it was regularly obtained, then the defendant must show that he has defence on the merits.

[17] To recap, the plaintiff's claim against the defendant founded on the cause of action for defamation was for the following reliefs:

(a) damages to be assessed;

(b) an injunction to restrain the defendant, his servants or agents or otherwise from speaking or further publishing, or causing or permitting

A to be published the said or similar words or any other words to the same or any similar effect in any manner whatsoever in the future;

(c) interest; and

(d) costs.

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[18] In *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 which concerned O 19 r 9 of the Rules of the High Court 1980 (which is pari materia with O 13 r 8 of the Rules of Court 2012), Seah SCJ speaking for the Supreme Court said:

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> Now, Order 19 rule 9 of the rules of the High Court 1980 gives a discretionary power to the judge in chambers to set aside a default judgment. This discretion is in terms unconditional. The Courts, however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence (per Lord Atkin in *Evans v Bartlam*.)
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> In *Anlaby & Ors v Praetorius* it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. The case was considered by the Privy Council in *MacFoy v United Africa Co Ltd*. and by the Court of Appeal in *White v Weston*. We would adopt this guideline in exercising the discretion contained in O 19 r 9. To quote Lord Guest in *Ratnam v Cumarasamy & Anor* 'The Rules of Court must prima facie be obeyed'. A fortiori, when the rules regulate how a default judgment may be obtained or given. There are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution and possibly bankruptcy proceedings.
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> In our opinion, Judgment in default of defence may be entered by the plaintiff either by way or final or interlocutory judgment in the following circumstances viz. when the claim of the plaintiff consists of:
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> (a) Order 19 rule 2 (liquidated damages only);
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> (b) Order 19 rule 3 (unliquidated damages only);
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> (c) Order 19 rule 4 (detention of moveable property only) and
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> (d) Order 19 rule 5 (possession of immoveable property only).
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> In this case, the claim of the respondent seems to be grounded on (a) deceit and/or (b) conspiracy to defraud/deceive. Since the respondents are unable to bring their case under any of the above rules, they should comply with r 7(1) by applying to the court or a judge for leave to enter judgment against the appellants. This they had failed to do and in our judgment, following *Anlaby* case, the judgment in default of defence dated June 22, 1984 was an irregular judgment as it was obtained in direct contravention of O 19 r 7(1). Applying the principle laid down in *Anlaby* case the appellants are entitled *ex debito justitiae* to have the default judgment set aside.
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> For these reason we think the learned judge failed to exercise his discretion judicially when he dismissed the application with costs instead of allowing it.

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[19] In the instant appeal, the plaintiffs' claim was not for: A

(a) liquidated damages only (O 13 r 1);

(b) unliquidated damages only (O 13 r 2);

(c) detention of moveable property only (O 13 r 3); or B

(d) possession of immoveable property only (O 13 r 4).

[20] Neither was the plaintiffs' claim for two or more of the above. Rather, the plaintiffs' claim was for injunction and damages to be assessed. This was a mixed claim under O 13 r 6 of the Rules of Court 2012 which provides: C

> 6(1) Where a writ is endorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not endorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance. D
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> (2) Where a writ issued against a defendant is endorsed as aforesaid, but by reason of the defendant satisfying the claim or complying with the demands thereof or any other like reason, it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter judgment with the leave of the Court against that defendant for costs. E
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> (3) An application for leave to enter judgment under paragraph (2) shall be by notice of application which must, unless the Court otherwise orders, and notwithstanding anything in Order 62, rule 10, be served on the defendant against whom it is sought to enter judgment. F

[21] The rationale for O 13 r 6(1) was stated by Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 where he said at p 582 (MLJ); p 323 (CLJ): G

> The philosophy underlying O 13 r 6(1) is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon a motion for judgment, that the case is a fit one for the grant of specific relief. H

[22] In holding that the judgment in default obtained by the plaintiffs in *Lai Yoke Ngan* was fundamentally flawed for being in breach of O 13 r 6(1), His Lordship Gopal Sri Ram referred to the decision of the Supreme Court in *Lam Kong Co Ltd v Thong Guan & Co (Pte) Ltd* [1985] 2 MLJ 429. In *Lam Kong Co Ltd*, Abdul Hamid CJ (Malaya), later CJ, Malaysia said the following in I

respect of O 13 r 12 of the Rules of the Supreme Court 1957, which was not dissimilar to O 13 r 6(1) of the Rules of the High Court 1980:

> It is to be observed that the effect of the rule was to disentitle the respondents from entering default judgment on a writ specially endorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the court or judge to consider giving judgment as upon the claim the court of judge should consider the respondents to be entitled. At that point of time therefore judgment in default was not only given in breach of r 12 but had resulted in a failure to comply with r 11 of O 27. In the circumstances we are constrained to hold that the breach and non-compliance were not mere irregularities but fundamental defects. *The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.* (Emphasis added.)

[23] Having perused the record of appeal, we found that there was no application filed by the plaintiffs for leave to enter judgment against the defendant as required under O 13 r 6(1) of the Rules of Court 2012. The notes of proceedings dated 20 February 2013 (appeal record A and B: p 39) captured the following on the hearing of encl (1) (which refers to the writ of summons and statement of claim):

> Hearing of Enclosure (1)
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> For the Plaintiff: Ling & Wong – Mr. Henry Ling
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> For the defendant: Absent
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> Mr. Henry Ling: Today is for mention. Writ was served on 3/11/2012 by way of personal service. Affidavit of service filed. Certificate of non-appearance filed. No defence filed.
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> Court: Plaintiff is not asking for declaration. Plaintiff claims for injunction order and damages to be assessed only. There is no provision in Rule 13 why interlocutory judgment cannot be ordered and damages to be assessed.
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> Interlocutory judgment entered against the defendant. Damages to be assessed by registrar. Injunction granted in prayer 2.

[24] Learned counsel for the plaintiffs relied on the case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 4 CLJ 175 to contend that the judgment in default was a regular judgment despite there being no application for leave. In *Yap Ke Huat*, this court had affirmed the decision of the High Court in dismissing the defendants' application to set aside a default judgment.

[25] With respect, we found learned counsel's reliance on *Yap Ke Huat*, misplaced for the reason that whilst the plaintiffs' claim therein was among others, for an account to be taken and for declaration, in entering the judgment

in default, the plaintiffs had abandoned their claim for account and declaration and had confined themselves to the claim for unliquidated damages. This can be clearly seen from the following judgment of James Foong JCA (as he then was) at p 127 (MLJ); pp 190–191 (CLJ):

> [39] It is our view that by confining themselves to the claim for unliquidated damages to be assessed and costs in the judgment in default, the plaintiffs had expressly elected to abandon their claim for accounts and declaration which are not within the description of those stated in r 1–4 of O 13 RHC. Effectively, they had plainly volunteered to relinquish these claims and this is expressly mentioned in the judgment in default itself. This entitled them to enter judgment in default against these defendants without the need for a motion to do so.

[26] The plaintiffs in the instant appeals however did not make an election but pursued their claim for injunction and in fact obtained the judgment in default for injunction. It is perhaps significant to observe that the plaintiffs, in obtaining the injunction order as they did, had also circumvented O 29 of the Rules of Court 2012, which prescribes the specific procedure governing the grant of an injunction.

[27] As for the plaintiffs' contention that there was delay in the filing of encl 66 by the defendant, we were of the view that there was no delay. We noted that the defendant did challenge the personal service purportedly effected on him by Mugang Ngang. Whilst there was an affidavit averred by the marketing manager of the plaintiffs' group of companies to oppose the defendant's application to set aside the default judgment, there was no affidavit filed by Mugang Ngang to rebut the defendant's averment that apart from the fact that he and Mugang Ngang had dinner, the writ and statement of claim was never served on him (see *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281). Even if there was any delay, it was our view that the delay was not fatal to the application (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30).

CONCLUSION

[28] Based on the aforesaid, we found that the judgment in default entered against the defendant was in contravention of O 13 r 6 of the Rules of Court 2012 and was therefore bad in law and ought to be set aside *ex debito justitiae*. We unanimously allowed the defendant's appeals with costs in the cause. The order of the High Court was set aside.

A *Appellant's appeal allowed with costs; High Court's order set aside.*

Reported by Dzulqarnain Ab Fatar

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